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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

This case, on remand for reconsideration in light of this Court's decision in *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), is an Eighth Circuit-wide class action brought under 42 U.S.C. 405(g) to challenge the Secretary's policies regarding the manner in which allegations of pain are evaluated in determining whether a claimant is eligible for Social Security disability benefits. The question presented is whether the court of appeals erred in requiring the Secretary to reopen the claims of thousands of class members, even though (i) Congress ratified and the court of appeals sustained the challenged policies, and (ii) the class members involved knowingly abandoned their claims when they failed to seek administrative review of the preliminary decisions denying their claims.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the other parties to these proceedings in the courts below were Patrick Blaschko, an intervenor, and the following class of plaintiffs certified by the district court (App. 54a-55a):

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
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> a) who have been or will be notified that their applications for Title II and/or/Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
>
> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
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> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982,

(d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.[1]

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[1] The claims of the members of the certified class who had been receiving benefits but whose benefits were terminated were remanded to the Secretary for reconsideration pursuant to Section 2 of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1794), and the court of appeals dismissed that portion of the class action (App. 9a-11a). Those individuals therefore are no longer parties to these proceedings.

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v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals on remand from this Court (App. 1a-2a) is reported at 804 F.2d 456. Prior opinions of the court of appeals (App. 4a-29a, 30a-34a) are reported at 751 F.2d 943 and 739 F.2d 1320, respectively. The orders of the district court (App. 35a-48a, 49a-84a) on matters pertaining to the class are reported at 585 F. Supp. 997 and 585 F. Supp. 1004, respectively. The orders of the district court remanding the individual claims of respondents Polaski and Blaschko to the Secretary (App. 85a, 94a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1986. The order denying the Secretary's peti-

tition for rehearing was entered on January 8, 1987 (App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 405(g) and Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460 (98 Stat. 1799) are reproduced at App. 102a-106a.

STATEMENT

This is an Eighth Circuit-wide class action brought pursuant to 42 U.S.C. 405(g) to challenge the policies of the Secretary of Health and Human Services regarding the manner in which a claimant's allegations of pain are evaluated in determining whether he is entitled to disability benefits under the Social Security Act. Although the court of appeals sustained the Secretary's policies, it ordered the Secretary to reopen the claims of thousands of class members who failed to pursue their administrative remedies after their claims were initially denied.

A. The Statutory And Regulatory Framework

1. *Procedural Provisions*

Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. (& Supp. III) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903; *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 3. If the state agency determines that a new applicant is not disabled or that the disability of a current recipient has ceased, the individual may request a de novo reconsideration by the state agency. The claimant is personally informed that he must request

reconsideration within 60 days of his receipt of the adverse initial determination (20 C.F.R. 404.904, 404.909(a)(1), 416.1404, 416.1409(a); see, *e.g.*, P. Tr. 167; B. Tr. 94[2]), and that determination becomes binding upon him if he does not do so. 20 C.F.R. 404.905, 416.1405.

If an individual is dissatisfied with the state agency's decision after reconsideration, he "shall be entitled to a hearing thereon by the Secretary" (42 U.S.C. (Supp. III) 421(d); see also 42 U.S.C. 1383(c)(1)). The Act requires—and the claimant is personally notified (see, *e.g.*, P. Tr. 169; B. Tr. 92)—that he must request a hearing before an administrative law judge (ALJ) within 60 days of his receipt of the state agency's reconsideration decision (42 U.S.C. (Supp. III) 405(b)(1); 42 U.S.C. 1383(c)(1)). The latter decision is binding upon the claimant if he does not timely request an ALJ hearing. 20 C.F.R. 404.920, 404.921(a), 404.933(b), 416.1404(b)(3), 416.1405, 416.1420, 416.1421(a), 416.1433(b).

If the ALJ's decision is adverse to the claimant, he then may seek review by the Appeals Council in the Social Security Administration. If a claimant does not request such review within 60 days, the adverse ALJ decision is binding. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468. Each claimant is personally informed that he must seek Appeals Council review within 60 days. See, *e.g.*, P. Tr. 23; B. Tr. 8. It is only after the Appeals Council has denied review, or has granted review and issued its own decision, that the Secretary has rendered his "final decision" on the individual's claim for benefits, which then is subject to judicial review pursuant to 42 U.S.C. 405(g). See 42 U.S.C. (& Supp. III) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210.

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[2] "P. Tr." refers to the transcript of the administrative record on the claim of the class representative, Lorraine Polaski. "B. Tr." refers to the transcript of the administrative record on the claim of intervenor Patrick Blaschko.

2. *Substantive Provisions*

Under both Title II and Title XVI of the Social Security Act, the term "disability" is defined to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that can be expected to result in death or to last for 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). The impairment must "result[] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3), 1382c(a)(3)(C). See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. The Social Security Administration (SSA) elaborated upon this regulation in Social Security Ruling (SSR) 82-58, which was issued in 1982. SSR 82-58 explains that symptoms may impose limitations beyond those indicated by objective medical findings and that the decisionmaker therefore must assess the impact of pain or other symptoms on the claimant's residual functional capacity to work. In making that assessment, SSR 82-58 requires consideration of both subjective and objective factors, including the claimant's allegations concerning the frequency and duration of the pain, the effect of the pain on the claimant's daily activities, the mitigating effect of medication, and recorded observations about the pain by examining physicians and SSA personnel. Gov't C.A. Addendum D.

B. The Proceedings In This Case

1. Respondent Polaski received Title II disability benefits beginning in 1979 (App. 36a). Her eligibility sub-

sequently was reviewed, and the state agency determined that her disability had ceased as of June 1982 because she was then able to engage in substantial gainful activity (P. Tr. 166). The state agency's decision was affirmed on reconsideration (P. Tr. 169), and the ALJ rendered a decision to the same effect after a hearing (P. Tr. 23-30). The ALJ expressly recognized that Eighth Circuit precedent permitted a finding of disability based on the claimant's subjective complaints of pain (P. Tr. 28). But the ALJ stressed that symptoms, including pain, are insufficient to establish disability unless medical findings or signs show that there is a medical condition that could reasonably be expected to produce those symptoms. The ALJ further emphasized that the mere assertion of pain does not foreclose inquiry into whether the claimant's complaints are credible. After reviewing the evidence under these principles, the ALJ concluded that "the record does not establish the existence of pain of such intensity and frequency so as to preclude [Polaski] from engaging in all types of competitive work activity" and that she could work in a "relatively low-stress, 'unskilled' work environment" (*ibid.*). The Appeals Council denied review of the ALJ's decision on November 28, 1983 (P. Tr. 6-7).

2. Polaski filed this civil action in January 1984 in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. 405(g), seeking review of the Secretary's final decision that her disability had ceased. Polaski later sought to amend her complaint to represent a class of claimants in the Eighth Circuit. Polaski alleged that the Secretary was "nonacquiescing" in Eighth Circuit case law with respect to (i) the evaluation of subjective complaints of pain, and (ii) a requirement that the Secretary find improvement in a recipient's medical condition before terminating that person's disability benefits (App. 36a).

By order dated April 17, 1984, the district court granted Polaski's motion to amend the complaint, certified an Eighth Circuit-wide class, and entered a Circuit-wide temporary restraining order (App. 35a-48a).[3] The class is defined to include all persons residing in the Eighth Circuit who have been or will be notified that their applications for disability benefits have been denied or that their benefits have been terminated; "who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved"; and "who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984" (App. 54a-55a).[4] In a subsequent order dated April 27, 1984, the district court

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[3] The district court also granted the motion of Patrick Blaschko to intervene (App. 37a). Blaschko, like Polaski, was a prior recipient of disability benefits whose benefits were terminated. After the Appeals Council denied Blaschko's request for review (B. Tr. 3-4), he sought judicial review in the district court on March 15, 1983. *Blaschko* v. *Heckler,* Civil No. 4-83-233 (D. Minn.). His action was assigned to a different judge (Murphy, J.) than the judge who decided the instant case (Lord, C.J.). On March 7, 1984, Judge Murphy remanded Blaschko's individual case to the Secretary for further proceedings in accordance with a magistrate's report that concluded that the ALJ had incorrectly discredited Blaschko's subjective complaints of pain (App. 94a-98a). Thus, Blaschko's individual action had already been resolved by a different judge when the district court permitted him to intervene in the instant case. On January 12, 1985, the Appeals Council rendered a decision fully favorable to Blaschko.

[4] The latter date was selected to comply with the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits (App. 26a). The district court adopted beginning dates other than January 30, 1984 for class members in Arkansas and Iowa, concluding that the running of the 60-day period had been tolled by the filing of separate class actions in those States (*id.* at 53a & n.1, 54a-55a). See pages II-III, *supra.*

rejected the Secretary's contention that the class could not include any persons who had failed to exhaust their administrative remedies, as required by 42 U.S.C. 405(g) (App. 51a-52a).

On the merits, the district court concluded that the Secretary's policies for the evaluation of pain embodied in 20 C.F.R. 404.1529 and SSR 82-58 were invalid (App. 59a-65a) and that the Secretary erroneously had terminated benefits without a finding of medical improvement (*id.* at 65a-68a). The court therefore entered a "preliminary injunction" that directed the Secretary: (i) to notify new-applicant class members who then had administrative appeals pending that they were entitled to have their claims considered under what the court defined as the "proper" pain standard and to submit additional evidence under that standard; and (ii) to notify class members whose applications had been denied and who did *not* have a timely appeal pending that they were entitled to have their claims reopened and readjudicated under the same conditions. The court ordered similar injunctive relief for class members whose benefits had been terminated (*id.* at 76a-84a).

3. The Secretary appealed the district court's order entering the preliminary injunction.[5] Because the Secretary maintained on appeal that the Department had been applying standards for the evaluation of pain that were consistent with Eighth Circuit law (see C.A. Br. 18-26), the court of appeals, after oral argument, suggested that the parties try to reach agreement on the appropriate standards (App. 31a). The parties thereafter did reach agreement (*id.* at 32a-33a), and on July 17, 1984, the court of appeals approved that agreement as a correct restatement of Eighth Circuit precedent (*id.* at 30a-34a).

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[5] The court of appeals granted a stay pending appeal (App. 31a), and that stay has remained in effect throughout these proceedings with respect to the class members at issue here.

The court of appeals issued its decision on the remaining issues in the case on December 31, 1984 (App. 4a-29a). In the meantime, Congress had enacted the Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*), which had a direct bearing on both the "medical improvement" and "pain" issues.

a. In Section 2(a) of the 1984 Act (98 Stat. 1794), Congress enacted standards for determining whether a person's disability benefits should be terminated on grounds of "medical improvement." See 42 U.S.C. (Supp. III) 423(f). In Section 2(d) of the 1984 Act (98 Stat. 1797-1798), Congress directed that the claims of class representatives and unnamed class members in certified class actions raising the "medical improvement" issue be remanded to the Secretary for reconsideration under the new standards, even if those individuals had not exhausted their administrative remedies as required by 42 U.S.C. 405(g). See *Bowen* v. *City of New York*, slip op. 18 n.14. In the instant case, the court of appeals concluded that all of the class members whose benefits had been terminated were covered by the special remand provisions of the 1984 Act. It therefore remanded the claims of those class members to the Secretary and dismissed the class action insofar as it involved the "medical improvement" cases (App. 9a-11a). That ruling was correct (see *Heckler* v. *Lopez*, 469 U.S. 1082 (1984), and *Heckler* v. *Kuehner*, 469 U.S. 977 (1984)) and is not at issue here.[6]

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[6] Although the court of appeals did not advert to the fact, the claim of respondent Polaski, the class representative, was covered by the special remand provisions of the 1984 Act. In fact, the district court separately remanded Polaski's case to the Secretary pursuant to those provisions on April 10, 1985 (App. 85a). Intervenor Blaschko's case also was subject to remand pursuant to Section 2 of the 1984 Act, and his individual case actually had been remanded by a different

b. The court of appeals next addressed the claims of those class members who had not previously been receiving disability benefits and who therefore were not covered by the special remand provisions in Section 2 of the 1984 Act. As to these class members (the new applicants), the instant case raised only the "pain" issue.

In Section 3 of the 1984 Act (98 Stat. 1799), Congress enacted new statutory standards for the evaluation of pain. See 42 U.S.C. (Supp. III) 423(d)(5)(A), reprinted at App. 104a-106a. As the court of appeals held, Section 3 was intended to ratify the Secretary's approach to the evaluation of pain by " 'put[ting] present regulatory policy into [the] statute' " and " 'more accurately reflect[ing] current policies' " (App. 18a-19a, quoting 130 Cong. Rec. H9836 (daily ed. Sept. 19, 1984) (remarks of Rep. Pickle), and H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984)). The court of appeals therefore concluded that

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district judge even before the 1984 Act was passed. See note 3, *supra*.

Section 2(d)(4) of the 1984 Act provides that the decision by the Secretary on a specially remanded case "shall be regarded as a new decision on the individual's claim for benefits" and "shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [42 U.S.C. 405] and regulations issued by the Secretary in conformity with such Section." 98 Stat. 1798. Polaski therefore cannot return to court unless she receives an adverse decision on remand and fully exhausts her administrative remedies. There accordingly is a question whether there has been a proper representative of the remaining class members—*i.e.*, the new-applicant members who challenged the Secretary's standards for the evaluation of pain—since April 10, 1985. There also is a serious question whether petitioner, who fully exhausted her administrative remedies before personally seeking judicial review, could in any event be a proper representative under Fed. R. Civ. P. 23(a)(3) of a class of claimants who knowingly declined to persue their administrative remedies and whose claims therefore are now barred by res judicata. See pages 15-16, *infra*.

Section 3 of the 1984 Act requires adjudicators to follow 20 C.F.R. 404.1529 and SSR 82-58, albeit in light of the agreement between the parties that was approved by the court on July 17, 1984 (App. 20a).

Thus, the court of appeals, unlike the district court, *approved* the Secretary's policies for the evaluation of pain. Moreover, Section 3 of the 1984 Act (in contrast to the special remand provisions in Section 2) does not provide for the readjudication of the claims of class members who made allegations of pain but who failed to exhaust their administrative remedies. Nevertheless, the court of appeals affirmed the district court's preliminary injunction insofar as it required the Secretary to provide for the reopening and readjudication of the claims of all of the new-applicant class members in this case, despite their failure to pursue their administrative remedies (App. 21a-28a).

4. The Secretary then filed a petition for a writ of certiorari seeking review of the court of appeals' reopening order. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986). See *Bowen* v. *Polaski*, No. 85-55 (June 9, 1986). On remand, the Secretary contended that the logic of this Court's decision in *City of New York* required modification of the Eighth Circuit's decision so as to exclude from the class those claimants who failed to exhaust their administrative remedies.

In a brief order, the court of appeals declined to amend its prior judgment, giving three reasons for declining to do so (App. 1a-2a). First, it relied on the fact that the Secretary had stated, in suggesting that the Court hold the government's petition in No. 85-55 pending disposition of *City of New York*, that the exhaustion issue here was similar to that in *City of New York*, where the Court ultimately held that exhaustion was not required. See 85-55 Pet. 12, 16; Reply Br. 2. Second, the court of appeals

stated that its judgment "simply require[d] that the claims of the questioned class members be reopened at the administrative level" and "[did] not order that benefits be paid" (App. 2a). Third, the court expressed the view that "[u]nless these class members are permitted to reopen their claims with the Secretary, they may suffer irreparable injury" (*ibid.*). The Secretary's petition for rehearing en banc was denied (*id.* at 3a).

REASONS FOR GRANTING THE PETITION

The court of appeals has affirmed a sweeping injunction that requires the Secretary to provide for the reopening and readjudication of the claims of some 8000 class members, even though (i) Congress ratified and the court of appeals approved the Secretary's policies governing those claims, and (ii) the class members knowingly allowed the administrative decisions denying their claims to become final and binding by failing to seek timely administrative review. This unprecedented order is inconsistent with the Court's decision last Term in *Bowen* v. *City of New York* regarding exhaustion of administrative remedies as a prerequisite to judicial review under 42 U.S.C. 405(g).

In *City of New York,* the Court carved out a narrow exception to the exhaustion requirement in what the Court called the "unique circumstances" of that case. Slip op. 17. Those "unique circumstances" were found to involve a secret, systemwide, and unlawful policy that realistically could not have been challenged by individual claimants. *Ibid.* But despite the Court's remand of the instant case for further consideration in light of *City of New York,* the court below did not even mention these critical aspects of the Court's rationale. Here, in sharp contrast to *City of New York,* the court of appeals *sustained* the very policies that the plaintiff class challenged. Those policies were published, not secret, and therefore could not have been the cause of the class members' failure to pursue their ad-

ministrative remedies. And in further contrast to the class of mentally impaired claimants in *City of New York*, it would not have been unrealistic or futile for the class members here to pursue their administrative remedies in order to correct any misinterpretation of the Secretary's policies that might have occurred in particular decisions at the early stages of the administrative review process.

If a court may excuse claimants from the consequences of their deliberate choices to forgo further review in circumstances such as these, then there is effectively nothing left of the exhaustion requirement that Congress enacted in 42 U.S.C. 405(g). Numerous other class actions raising similar exhaustion issues are pending in the lower courts, and such suits will proliferate if the courts persist in what we believe to be a fundamental misunderstanding of this Court's exhaustion ruling in *City of New York*. Review by this Court is thus warranted at this time.

1. This Court's ruling in *City of New York* does not support the court of appeals' almost casual reaffirmance of the district court's injunction, which would require the reopening of the claims of some 8000 class members. The Secretary's decisions denying each member's claim are now final and binding by operation of 42 U.S.C. 405(g), implementing regulations, and this Court's own prior decisions addressing the jurisdictional prerequisites to suit under 42 U.S.C. 405(g). See *Heckler* v. *Ringer*, 466 U.S. 602 (1984); *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *Eldridge*, *supra*. The Court in *City of New York* did not purport to sweep those prerequisites aside. See slip op. 3-4, 13-14. To the contrary, it stated that "exhaustion is the rule in the vast majority of cases" and that exhaustion was excused in *City of New York* only because of its "unique circumstances" (slip op. 18, 17). Contrary to the court of

appeals' holding on remand, this class action is clearly controlled by the principles that govern "the vast majority of cases" (*ibid.*).

a. The general rule that a person seeking benefits under the Social Security Act must pursue his administrative remedies before filing suit is not merely a "judicially developed doctrine of exhaustion" (*Salfi,* 422 U.S. at 766). That requirement is mandated by the language of 42 U.S.C. 405(g) itself, which provides that an individual may obtain judicial review only "after [a] *final decision* of the Secretary made after a hearing to which he was a party" (emphasis added). Because the existence of a "final decision" is a condition on Congress's waiver of sovereign immunity (compare *City of New York,* slip op. 10-11), the Court has held that a "final decision" is "central to the requisite grant of subject-matter jurisdiction" and therefore is a "statutorily specified jurisdictional prerequisite" to suit (*Salfi,* 422 U.S. at 764, 766; accord, *Ringer,* 466 U.S. at 617).

Congress has left to the Secretary to specify by regulation what constitutes the "final decision" that terminates administrative proceedings on a particular claim and triggers the right of judicial review. *Salfi,* 422 U.S. at 766 & n.9. "Pursuant to [his] rulemaking authority," the Secretary "has provided that a 'final decision' is rendered on a * * * claim only after the individual claimant has pressed his claim through all designated levels of administrative review" (*Ringer,* 466 U.S. at 606; see also *Salfi,* 422 U.S. at 765). See pages 2-3, *supra.* This requirement has been embodied in the regulations governing review of social security claims for almost 50 years. See 5 Fed. Reg. 4171-4174 (1940), adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), 403.710(e); S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 38-39, 51-53 (1941). The Court held in *Salfi* that the prerequisite of a final decision

by the Appeals Council "may not be dispensed with merely by a judicial conclusion of futility" (422 U.S. at 766; see also *Ringer,* 466 U.S. at 618-619).

b. When Congress enacted the disability program in 1954 and 1956 and the SSI program in 1972,[7] it specified that a disability claimant under either program may obtain judicial review of the Secretary's "final" decision rendered after a hearing, in the same manner "as is provided in section 405(g)" (see 42 U.S.C. (& Supp. III) 421(d), 1383(c)(3)). In view of the long-established rule under Section 405(g) that a claimant must obtain a decision by the Appeals Council before seeking judicial review, Congress's express incorporation into the disability programs of the finality requirement and other procedures under Section 405(g) constitutes a clear directive that the same exhaustion rule is to be applied under those programs. See *Lindahl* v. *OPM,* 470 U.S. 768, 782 & n.15 (1985); *Lorillard* v. *Pons,* 434 U.S. 575, 580-581 (1978).

Congress's general adherence to the exhaustion requirement in 42 U.S.C. 405(g) was confirmed by the Social Security Disability Benefits Reform Act of 1984. The Senate Report, in connection with its discussion of the "medical improvement" issue that ultimately was resolved by Section 2 of the 1984 Act (see page 8, *supra*), explains the jurisdictional principles that govern judicial review under the disability programs. See S. Rep. 98-466, 98th Cong., 2d Sess. 13-17 (1984). The Senate Report reflects a clear understanding that the exhaustion rules prescribed by governing regulations and *Salfi* and *Ringer* are fully applicable to the disability programs and that an Appeals Council decision is a prerequisite to judicial review. S. Rep. 98-466, *supra,* at 15. Congress did not disturb

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[7] Social Security Amendments of 1954, Pub. L. No. 761, § 106, 68 Stat. 1079; Social Security Amendments of 1956, Pub. L. No. 880, § 103, 70 Stat. 815; Social Security Amendments of 1972, Tit. III, Pub. L. No. 92-603, 86 Stat. 1465 *et seq.*

the general operation of those settled principles in 1984, although it did carve out a limited exception for "medical improvement" cases. See page 20, *infra*. Against this background, "it would be an unwarranted judicial intrusion into this pervasively regulated area" (*Heckler* v. *Day*, 467 U.S. 104, 119 (1984)) for a court, in the absence of the most compelling reasons, to excuse a claimant from his procedural default in failing to pursue his administrative remedies as a precondition to judicial review.[8]

c. The court of appeals' decision in this case wholly fails to respect these governing principles. The named class representative, respondent Polaski, did exhaust her administrative remedies and, hence, the courts below properly took jurisdiction of her individual claim. But those courts had no authority under Section 405(g) to grant relief to the thousands of unnamed class members who, unlike Polaski, did not exhaust their administrative remedies by obtaining decisions from the Appeals Council. This Court repeatedly has held that a class may be certified in an action under 42 U.S.C. 405(g) only if *each* of the class members individually satisfies the requirements of that

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[8] This conclusion is reinforced by the fact that where Congress *has* concluded that disability claimants might experience undue financial hardship while they pursue their administrative remedies, it nevertheless has declined to dispense with the exhaustion requirement. Instead, Congress has enacted provisions permitting certain claimants—those who previously had been receiving benefits and might have become dependent upon them, but who were found by the state agency no longer to be disabled—to continue to receive benefits through the ALJ hearing stage. See 42 U.S.C. (Supp. III) 423(g). In all other circumstances, however, Congress has continued to regard a retroactive award of benefits at a later stage of the administrative and judicial review process to be a fully adequate remedy for an erroneous denial of benefits at a preliminary stage of that process. See *Mathews* v. *Eldridge*, 424 U.S. at 339-340.

Section, including the "final decision" requirement. *Califano* v. *Yamasaki,* 442 U.S. 682, 701, 704 (1979); *Mathews* v. *Diaz,* 426 U.S. 67, 71 n.3 (1976); *Salfi,* 422 U.S. at 764. Indeed, the fact that Polaski exhausted her administrative remedies suggests that similarly-situated claimants could have done the same if they truly wished to challenge the denial of their claims. Instead, those unnamed class members elected to forgo the opportunity to seek further review after they were expressly notified of their right to do so. As a result, not only did they fail to obtain the "final decision" of the Secretary that is a precondition to judicial review; the state-agency or ALJ decisions denying their claims also became binding against them on the merits and now have res judicata effect. See pages 2-3, *supra.*

2. a. The court of appeals, without referring to the foregoing considerations, believed that its order requiring the reopening of the closed cases of the unnamed class members could be justified on the authority of *City of New York.* The court of appeals was mistaken. This Court rested its holding in *City of New York* on the "unique circumstances" of that case (slip op. 17). Specifically, the Court relied on the district court's finding that there had been a "systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations" (*ibid.*). And the Court also observed that "exhaustion would have been futile" in view of the fact that the secret policy "was being adhered to by state agencies due to pressure from SSA" (*ibid.*).

None of these factors upon which the Court relied in *City of New York* is present here. The policy challenged by respondents was not "unrevealed" or secret; it was embodied in a published regulation and Social Security Ruling. There accordingly can be no suggestion here, as there was in *City of New York,* that "secretive conduct" by the government might have lulled claimants into inactivity,

inducing them to abandon attempts to seek administrative review of "a policy they could not know existed" (slip op. 12-13, 14). In further contrast to *City of New York,* the court below held that the policies challenged here were *lawful* and had been ratified by Congress (App. 18a-19a). The court of appeals had no authority to order circuit-wide reopening of claims in the absence of any finding of an unlawful circuit-wide policy.

The agreement between the parties that was approved by the court of appeals in July 1984 did state that "some adjudicators" had misinterpreted the Secretary's policies regarding the evaluation of pain that were embodied in SSR 82-58. However, this Court made unambiguously clear in *City of New York* that such allegations do not permit a court to dispense with the exhaustion requirement even in an individual case (slip op. 16-17):

> This case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation. Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context. Thus, our holding today does not suggest that exhaustion is to be excused whenever a claimant alleges an irregularity in the agency proceedings.

A fortiori, in a class action, allegations that errors may have occured in *some* individual cases do not permit a court to dispense with the exhaustion requirement for *all* class members.[9]

[9] Indeed, once the court of appeals concluded that the pain regulation and the SSR that the plaintiffs challenged were facially valid,

b. The court of appeals also sought to support its result by theorizing that class members "may suffer irreparable injury" unless the Secretary reopened their claims (App. 2a). But this rationale likewise draws no support from *City of New York*. In excusing exhaustion there, the Court relied upon the district court's finding that the mentally impaired class members "not only were denied the benefits they were seeking, but '[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback' " (slip op. 15 (citation omitted)). Compare *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242, 244 (1980). In this case, by contrast, neither court below found that pursuit of the administrative review process would *itself* cause harm to the instant plaintiffs. Rather, the "irreparable injury" cited by the court of appeals (App. 23a-24a) flowed from the facts that those individuals voluntarily elected not to pursue their claims and that their claims (unless reopened) were now barred by res judicata. But if the adverse financial consequences flowing from the denial of one's claim—consequences that any disability claimant might allege—were sufficient to dispense with exhaustion, the "final decision" requirement in 42 U.S.C. 405(g) would be nugatory in disability cases. Congress clearly did not intend that result when it incorporated 42 U.S.C. 405(g) and its well-established exhaustion requirement into the disability and SSI programs.

For similar reasons, the court of appeals' passing observation that it was merely requiring that claims be reopened, not that benefits be paid (App. 2a), is not in itself a basis for dispensing with the exhaustion requirement. If it were, no decision denying benefits would ever become

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each individual class member's entitlement to benefits necessarily turned on the facts of his own impairment. As a result, there was no longer a question of law or fact common to the members of the class, and the case should not have been permitted to proceed as a class action. See Fed. R. Civ. P. 23(a)(2).

final. This Court in *City of New York* did observe that the legal arguments presented there were "collateral" to any claim for benefits in the sense that the class members were not actually seeking an award of benefits, but were seeking to challenge a policy that improperly had tainted the administrative decision-making process. Slip op. 15. In this case, by contrast, the court of appeals has held that the Secretary's policies governing the evaluation of pain were both published and lawful. The instant plaintiffs thus advance no claim that is collateral in *any* sense to their claims for benefits; they simply wish to argue that a particular state-agency decision-maker or ALJ may have erred in deciding their particular cases. Moreover, in *City of New York,* the Court did not rest its exhaustion ruling on the mere fact that the claimants were not actually requesting an award of benefits. See slip op. 16-17.

In sum, the court of appeals was obligated on remand for reconsideration in light of *City of New York* to define the "unique circumstances" that distinguished the instant case from the "vast majority of cases" in which exhaustion would be required. See slip op. 18. The court of appeals made no effort to do so. It decision on remand is thus inconsistent with the reasoning and result of this Court's decision.[10]

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[10] The court of appeals observed on remand that the Secretary had stated on petition for certiorari on the prior occasion that "the exhaustion issue in this case was essentially identical to that presented to the Supreme Court in [*City of New York*]" (App. 2a). However, an explanation that two cases present some of the same *general* issue of law is standard in requesting the Court to hold a petition in one case for the decision in the other. Moreover, in a passage the court below ignored, the prior certiorari petition in this case (85-55 Pet. 14) argued that the Eighth Circuit decision was more "egregious" than that of the Second Circuit in *City of New York* because the Eighth Circuit did not even find any unlawful policy. In any event, this Court did not simply deny the Secretary's prior certiorari petition in this case, as it presumably would have done if it believed that this case was controlled by its decision in *City of New York*; instead, the Court vacated and remanded for further consideration in light of *City of New York*.

3. If there could be any doubt about the impropriety of the reopening relief ordered by the court of appeals, it is dispelled by the Social Security Disability Benefits Reform Act of 1984. In order to resolve the controversy over the "medical improvement" issue, Congress directed in Section 2(d) of the Act that numerous claims raising that issue be remanded to the Secretary for readjudication under the new statutory standards, even if the individuals involved had not exhausted their administrative remedies. See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 27 (1984); S. Rep. 98-466, *supra,* at 14. The claims of the terminated beneficiaries in this case—including that of the class representative—were duly remanded under this provision. See page 8, *supra*. But Congress did not enact such special reopening relief for any other category of claimants, such as the new-applicant class members here who made allegations of pain. Indeed, Congress could not possibly have envisioned reopening relief for class members making such allegations, since Congress in 1984 explicitly *ratified* the Secretary's policies in that respect.

It is in fact Congress's ratification of the Secretary's policies regarding pain that distinguishes the instant case most pointedly from *City of New York*. The *City of New York* case involved the Secretary's policies for the evaluation of mental impairments, and Congress in 1984 strongly criticized those policies. The House Report noted that the courts had raised serious questions about the Secretary's mental impairment standards and that "in many cases individuals ha[d] been improperly denied benefits" (H.R. Rep. 98-618, 98th Cong., 2d Sess. 15 (1984)). Accordingly, in Section 5 of the 1984 Act (98 Stat. 1801-1802), Congress directed the Secretary to develop new standards for the evaluation of mental impairments, imposed a temporary moratorium on the continuing review of such claimants, and permitted mentally impaired individuals whose claims

were denied to reapply for benefits under the new standards. See *City of New York,* slip op. 18 n.14; H.R. Rep. 98-618, *supra,* at 15-16; H.R. Conf. Rep. 98-1039, *supra,* at 30-31.

By contrast, as the court of appeals held (App. 19a-20a), Congress in the 1984 Act explicitly approved the Secretary's policies regarding the evaluation of pain and signaled its intent to terminate litigation then pending on the subject. The Senate Report stated that "[i]t has come to the attention of the Committee that there are a number of outstanding court cases which are challenging the current policies of the Administration concerning the weight to be attached to the claimant's subjective allegations concerning pain" (S. Rep. 98-466, 98th Cong., 2d Sess. 23-24 (1984)). The instant litigation and the *Hyatt* litigation in the Fourth Circuit (see pages 22-23, *infra*)—two major class actions involving thousands of claimants—no doubt were the principal such cases that the Committee had in mind.[11] The Senate Report, however, expressed strong disapproval of these cases (*ibid.*), stating that the Secretary's regulations concerning pain

> should receive appropriate deference by the courts. However, if courts ignore the Secretary's regulatory authority and the expressed Congressional concerns for careful administration, national uniformity, and verifiable evidence, the Committee has little choice but to draw the statute as narrowly as possible. For this reason, the Committee has included in the statutory rules for determining disability a specific rule for evaluating subjective allegations of pain. It is the clear intention of the Committee that this rule should be seen as a codification of the regulations and policies currently followed by the Administration.

Other aspects of the legislative history reiterate this intention to prevent judicial intrusion into the Secretary's

[11] See S. Rep. 98-466, *supra,* at 45 (additional views of Senator Long) (strongly criticizing the district court's ruling "[i]n a recent case, *Polaski* v. *Heckler*").

evaluation of pain.[12] The court of appeals' order that the Secretary readjudicate claims that were processed under the very policies that Congress endorsed flies in the face of this congressional judgment.

4. The practical significance of the exhaustion issue presented in this case is illustrated by the dimensions of the litigation on the subject in the lower courts. In addition to affecting some 8000 claims in this case alone, the Eighth Circuit's ruling presumably also will control the exhaustion issue in a similar class action in Missouri involving an estimated 9500 claims. *Boyd* v. *Heckler,* Civil No. 83-0352-CV-W-1 (W.D. Mo.). In another class action challenging the Secretary's approach to the evaluation of

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[12] See 130 Cong. Rec. H9834 (daily ed. Sept. 19, 1984) (remarks of Rep. Rostenkowski):

> The final bill also contains more explicit language concerning pain, which we hope will resolve pending litigation until the Social Security Subcommittee reviews a mandated study and report.

Id. at S11458 (remarks of Sen. Long):

> Instead of granting deference to the Secretary's inherent regulatory authority to determine the criteria for establishing disability, a number of courts have chosen to substitute their policy judgment that subjective allegations must be considered even in the absence of objective evidence of the type required by regulation. Ultimately, this would mean that eligibility would depend upon the subjective credibility judgment made by each individual adjudicator of claims. This is not much different from turning over the trust funds to the judges and letting them hand out the funds on a case-by-case basis as they see fit.

H.R. Rep. 98-618, *supra,* at 14:

> The committee is * * * reluctant at this time to allow determinations of disability to be based on such subjective criteria. There is plainly a critical need for a clear legislative policy, to be applied in all cases on a nationwide basis; it is not appropriate for the Federal courts to establish policy on such an issue simply because the statute is insufficiently specific.

See also H.R. Conf. Rep. 98-1039, *supra,* at 28-29.

pain, the Fourth Circuit has required the reopening of the claims of an estimated 80,000 class members who likewise abandoned their claims at the preliminary stages of the administrative review process. *Hyatt* v. *Heckler,* 807 F.2d 376 (4th Cir. 1986). We have been informed by the Department of Health and Human Services that there are about 30 other class actions currently pending under the disability programs that raise similar exhaustion issues. In one of those cases, a district court in New York has rendered a decision that, when implemented, will require the reopening of an estimated 80,000 claims. *New York* v. *Bowen,* No. 83 Civ. 5903 (RLC) (S.D.N.Y. Jan. 21, 1987).

We believe that these decisions manifest a serious misapprehension of this Court's holding in *City of New York*. The Court there recognized an extraordinary exception to the exhaustion requirement, but the lower courts in the wake of that decision have begun to expand that exception to a point where it swallows the rule. Although there is as yet no conflict among the circuits on this issue, we think it appropriate for the Court to act now to stem a trend of decisions that threaten to undermine administrative finality on a truly staggering scale. The instant case, which the Court previously vacated for reconsideration in light of *City of New York*, is a suitable vehicle for addressing this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APRIL 1987